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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554In the Matter of
DISPATCHED BYGeographic Partitioning and Spectrum
Disaggregation by Commercial Mobile
Radio Services LicenseesImplementation of Section 257 of the
Communications Act --
Elimination of Market Entry Barriers

) WT Docket No. 96-148

) GN Docket No. 96-113 ✓

**REPORT AND ORDER
AND
FURTHER NOTICE OF PROPOSED RULEMAKING**

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Comments to be filed in WT Docket No. 96-148 only.

By the Commission:

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I. INTRODUCTION

1. In this *Report and Order and Further Notice of Proposed Rulemaking*, we consider the proposals set forth in the *Notice of Proposed Rulemaking (Notice)*¹ in WT Docket No. 96-148 concerning geographic partitioning and spectrum disaggregation² by broadband personal communications service (PCS) licensees.³ We also consider adopting similar partitioning and disaggregation rules for cellular and General Wireless Communications Services (GWCS) licensees. The rules we adopt herein for broadband PCS will permit partitioning and disaggregation by all broadband PCS licensees. We believe these rules will provide broadband PCS licensees with desirable flexibility to determine the amount of spectrum they will occupy and the geographic area they will serve. We believe that such flexibility will (1) facilitate the efficient use of spectrum by providing licensees with the flexibility to make offerings directly responsive to market demands for particular types of service; (2) increase competition by allowing market entry by new entrants; and (3) expedite the provision of service to areas that otherwise may not receive broadband PCS service in the near term.

II. EXECUTIVE SUMMARY

2. In order to meet our statutory responsibility to exercise authority and control over radio spectrum to ensure that spectrum is utilized for the benefit of all the Nation's citizens,⁴ we have adopted rules for Commercial Mobile Radio Services (CMRS) that generally permit open entry, allow flexibility, encourage technical efficiency, promote innovation and facilitate seamless networks. The Commission believes that its CMRS rules should permit licensees to respond to market forces and demands, thereby permitting and promoting the operation of competitive market forces. Such flexibility eliminates artificial market entry barriers by allowing licensees to respond to public demands for service as well as introducing innovative services and technologies. Adopting the rules proposed in this proceeding, will result in more efficient use of spectrum by allowing licensees to transfer part of their spectrum to a party that values it more highly and also promote competition by increasing the diversity of service offerings and the number of providers offering competing services. To further our goals of encouraging flexible

¹ Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, WT Docket No. 96-148, FCC 96-287, *Notice of Proposed Rulemaking*, 11 FCC Rcd 10187 (1996) (*Notice*).

² Partitioning is the assignment of geographic portions of the PCS license along geopolitical or other boundaries. Disaggregation is the assignment of discrete portions or "blocks" of spectrum licensed to a geographic licensee or qualifying entity.

³ PCS is defined as radio communications that encompass mobile and ancillary fixed communications that provide services to individuals and businesses and can be integrated with a variety of competing networks. 47 C.F.R. § 24.5. See also Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Second Report and Order*, 8 FCC Rcd 7700 (1993) (*Broadband PCS Second Report and Order*). Broadband PCS is defined as PCS services operating in the 1850-1890 MHz, 1930-1970 MHz, 2130-2150 MHz, and 2180-2200 MHz bands. 47 C.F.R. § 24.5.

⁴ See 47 U.S.C. §§ 151, 301.

use of CMRS spectrum, eliminating entry barriers, reducing regulatory burdens, encouraging competition, and expediting services to the largest number of users, we modify our broadband PCS rules and propose modifications to our cellular and GWCS rules as follows:

A. Partitioning

- Broadband PCS licensees in the A, B, D, and E blocks may partition their license areas to other eligible entities at any time following the issuance of their licenses. The current restriction permitting partitioning only to rural telephone companies (rural telcos) is eliminated.
- Partitioning of PCS licenses is permitted based on any geographic area defined by the parties, provided that they submit information to the Commission regarding the relevant boundaries or coordinates.
- Entrepreneur block (C and F block) licensees may partition to other entities similarly qualified as entrepreneurs at any time following the issuance of their licenses. Entrepreneur block licensees may not partition to non-entrepreneurs during the first five years of their license term. After the first five years, partitioning to non-entrepreneurs is permitted, provided that the partitioner pays an unjust enrichment payment based on the population of the partitioned area calculated based upon the latest available census data.
- Separate installment payment and default obligations are established for the initial entrepreneur block licensees and the entrepreneur partitionees. When an entrepreneur block licensee paying its winning bid through installment payments partitions to a party that would qualify for installment payments, the partitionee will be permitted to make installment payments of its *pro rata* portion of the remaining government obligation. New financing documents (promissory notes and security agreements) will be issued to the partitioner and partitionee. The payments will be based upon the ratio of the population of the partitioned area to the population of the entire original license area calculated based upon the latest available census data. Partitionees that do not qualify for installment payments will be required to pay their entire *pro rata* share within 30 days of Public Notice conditionally granting the partitioning transaction.
- The partitioner and partitionee may choose from two construction options for the partitioned area. Under the first option, the partitionee may certify that it will satisfy the same construction requirements as the original licensee. The partitionee must meet the same five- and ten-year service requirements for its partitioned area as the original 10 MHz or 30 MHz licensee in its partitioned area. Under the second option, the partitioner certifies that it has met or will meet the five-year construction requirement and that it will meet the ten-year construction requirement for the entire market. In that case, the partitionee will only be required to meet a substantial service requirement for its partitioned area at the end of the ten-year license term.

B. Disaggregation

- The January 1, 2000 benchmark and five-year build-out requirement as prerequisites for disaggregation are eliminated. Broadband PCS licensees in the A, B, D, and E blocks may

disaggregate spectrum to other eligible entities at any time following the issuance of their licenses.

- Disaggregation is allowed for any amount of spectrum and there will be no requirement that the disaggregator retain a minimum amount of spectrum.
- Entrepreneur block (C and F block) licensees may disaggregate to other parties qualified as entrepreneurs at any time following the issuance of their licenses. Entrepreneur block licensees may not disaggregate to non-entrepreneurs for the first five years of their license term. After the first five years, entrepreneur block licensees may disaggregate to non-entrepreneurs, provided that the partitioner compensates the Federal government through an unjust enrichment payment proportionate to the amount of spectrum disaggregated.
- When an entrepreneur block licensee paying its winning bid through installment payments disaggregates to a party that would qualify for installment payments, the disaggregatee will be permitted to make installment payments of its *pro rata* portion of the remaining government obligation. New financing documents (promissory notes and security agreements) will be issued to the disaggregator and disaggregatee). The payments shall be based upon the ratio of the amount of spectrum disaggregated to the amount of spectrum licensed. Disaggregatees that do not qualify for installment payments shall be required to pay their entire *pro rata* share within 30 days of Public Notice conditionally granting the disaggregation transaction.
- Parties seeking approval of a disaggregation agreement must include a certification as to which party will be responsible for meeting the applicable five and ten-year construction requirements. The specific requirements to be met will depend on whether the spectrum being disaggregated was originally licensed as a 30 Mhz block or a 10 MHz block. In the event that the party taking responsibility for meeting the construction requirement fails to do so, that party's license will be subject to forfeiture, but the other party's license will not be affected.

C. Related Matters

- Combined partitioning and disaggregation is permitted.
- The Commission's current partial assignment procedures will be used for reviewing partitioning and disaggregation requests.
- Upon FCC approval, partitionees and disaggregatees will hold their licenses for the remainder of the original licensees' license term and partitionees and disaggregatees may earn a renewal expectancy similar to other PCS licensees.
- The 45 MHz CMRS spectrum aggregation limit applies to partitioned license areas and disaggregated spectrum.
- Partitionees and disaggregatees have the same rights and obligations under our microwave relocation rules as initial PCS licensees, including rights and obligations established under the

cost-sharing plan adopted in WT Docket No. 95-157. Initial licensees will not be required to guarantee the relocation payments of partitionees or disaggregatees.

- The Commission will make information about licensed PCS spectrum publicly available in a user-friendly format to provide interested parties with information needed to identify and assess opportunities for partitioning and disaggregation.

D. Further Notice of Proposed Rulemaking

- We seek comment on whether to permit disaggregation of cellular and GWCS spectrum and to allow more open partitioning of GWCS licenses.
- We propose allowing GWCS licensees to partition their license based upon any geographic area defined by the parties.
- We invite comment on whether minimum disaggregation standards are necessary for cellular and GWCS.
- We tentatively conclude that combined partitioning and disaggregation should be allowed for cellular and GWCS.
- We seek comment as to whether our existing cellular partitioning rule is sufficiently flexible to facilitate cellular partitioning and we propose adopting dual constructions options, similar to those adopted for broadband PCS, for GWCS partitioning.
- We propose limiting the license term of cellular and GWCS partitionees and disaggregatees to the remainder of the original licensee's ten-year license term and granting GWCS partitionees and disaggregatees the same renewal expectancy as other GWCS licensees.
- We propose using methods similar to those adopted for broadband PCS for calculating the amount of unjust enrichment payments that must be paid when a designated entity GWCS licensee partitions or disaggregates to a non-designated entity.
- We propose that the current cellular and GWCS partial assignment rules will be used for cellular disaggregation and for GWCS partitioning and disaggregation.

III. BACKGROUND

3. Our initial regulations and policies for broadband PCS were adopted in the *Broadband PCS Second Report and Order*, and amended in the *Broadband PCS Memorandum Opinion and*

Order.⁵ In the *Broadband PCS Memorandum Opinion and Order*, the Commission declined to adopt unrestricted geographic partitioning for broadband PCS based on its concern that licensees might use partitioning as a means of circumventing construction requirements.⁶ However, the Commission stated that it would consider the issue of geographic partitioning for rural telcos and other designated entities in a future proceeding to establish competitive bidding rules for broadband PCS.⁷ The Commission then permitted broadband PCS geographic partitioning for rural telcos in the *Competitive Bidding Fifth Report and Order*.⁸ The Commission observed that partitioning was one method to satisfy Congress' mandate to provide an opportunity for rural telcos to participate in the provision of broadband PCS.⁹ The Commission also found that rural telcos could take advantage of their existing infrastructure to provide broadband PCS services, thereby speeding service to rural areas.¹⁰ In the *Competitive Bidding Further Notice of Proposed Rulemaking*, the Commission sought comment on whether to extend post-auction geographic partitioning of broadband PCS licenses to women- and minority-owned businesses.¹¹

⁵ Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, *Memorandum Opinion and Order*, 9 FCC Rcd 4957 (1994) (*Broadband PCS Memorandum Opinion and Order*).

⁶ *Broadband PCS Memorandum Opinion and Order*, 9 FCC Rcd at 4990, ¶ 83.

⁷ *Id.*

⁸ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5597-99, ¶¶ 150-152 (1994) (*Competitive Bidding Fifth Report and Order*). The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), amending the Communications Act of 1934, for the first time enacted a statutory definition for rural telephone companies. See 47 U.S.C. § 153(37). We adopted this definition for broadband PCS designated entity provisions. See 47 C.F.R. § 24.720(e); Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, *Report and Order*, 11 FCC Rcd 7824, 7853-55, ¶¶ 62-66 (1996) (*D, E, and F Block Report and Order*).

⁹ *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5599, ¶ 153; see *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2391 n.186; see also 47 U.S.C. § 309(j)(3) (establishing objectives the Commission must consider in promulgating competitive bidding rules).

¹⁰ *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5597-99, ¶¶ 150-152.

¹¹ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Further Notice of Proposed Rule Making*, 9 FCC Rcd 6775, ¶ 4 (1994) (*Competitive Bidding Further Notice of Proposed Rule Making*).

4. Section 24.229(c) of the Commission's rules¹² permits a broadband PCS licensee that has met its five-year construction requirement¹³ to disaggregate its licensed PCS spectrum after January 1, 2000. In the *Broadband PCS Memorandum Opinion and Order*, the Commission reasoned that this limit on spectrum disaggregation for broadband PCS would allow the PCS market to develop and prevent anti-competitive practices with regard to disaggregation.¹⁴

5. In the *Notice* in this docket, we proposed liberalized partitioning and disaggregation for broadband PCS licensees. We noted that the Commission presently permits, or is seeking comment on, geographic partitioning and spectrum disaggregation for several services, e.g., Multipoint Distribution Service (MDS),¹⁵ General Wireless Communications Service,¹⁶ 800 MHz Specialized Mobile Radio (SMR),¹⁷ paging,¹⁸ 220 MHz,¹⁹ 900 MHz SMR,²⁰ 38 GHz fixed point-

¹² 47 C.F.R. § 24.229(c).

¹³ Licensees of 30 MHz blocks must serve with a signal level sufficient to provide adequate service to at least one-third of the population in their licensed area within five years of being licensed. 47 C.F.R. §24.30(a). Licensees of 10 MHz blocks must serve with a signal level sufficient to provide adequate service to at least one-quarter of the population in their licensed area within five years of being licensed, or make a showing of substantial service in their licensed area within five years of being licensed. *Id.*

¹⁴ *Broadband PCS Memorandum Opinion and Order*, 9 FCC Rcd 4957, 4985, ¶ 69.

¹⁵ Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, *Report and Order*, 10 FCC Rcd 9589, 9614-15, ¶¶ 46, 47 (1995) (*MDS Report and Order*). Additionally, we impose unjust enrichment provisions for partitioning by small businesses to non-small businesses. See Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, *Memorandum and Order on Reconsideration*, 10 FCC Rcd 13821, 13833, ¶¶ 69-70 (1995).

¹⁶ Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, *Second Report and Order*, 11 FCC Rcd 624, 665, ¶¶ 105 (1995) (*GWCS Second Report and Order*) (permitting rural telco partitioning).

¹⁷ Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket No. 93-144, *First Report and Order*, *Eighth Report and Order*, and *Second Further Notice of Proposed Rule Making*, 11 FCC Rcd 1463, 1576, ¶¶ 253, 257, 264 (1995) (*800 MHz Second FNPRM*) (requesting comment on partitioning and disaggregation).

¹⁸ Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, *Notice of Proposed Rulemaking*, 11 FCC Rcd 3108, 3135-36, ¶¶ 136-138 (1996) (*Paging NPRM*) (proposing partitioning for rural telcos and seeking comment on partitioning and disaggregation for all licensees).

¹⁹ Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, *Second Memorandum Opinion and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 188, 273-274, ¶ 175-177, (1995) (*220 MHz Third NPRM*) (proposing partitioning for rural telcos, and seeking comment on partitioning and disaggregation for all licensees).

to-point microwave,²¹ and the Wireless Communications Service (WCS).²² We believe that it is appropriate at this time to liberalize our rules to allow partitioning and disaggregation for broadband PCS. The rules adopted in this *Report and Order* will provide licensees with the flexibility to use their spectrum more efficiently, will increase opportunities for small businesses and other entities to enter into the broadband PCS market, and will speed service to underserved or unserved areas.

IV. DISCUSSION

A. Partitioning

1. License Eligibility

6. Proposal. In the *Notice*, we tentatively concluded that allowing broadband PCS licensees to partition their service areas could lead to the creation of smaller areas that could be licensed to small businesses, including those entities that may not have had the resources to participate successfully in spectrum auctions.²³ Additionally, we found that partitioning would allow later entrants into the telecommunications market to enter the broadband PCS market after auction.²⁴ We also found that partitioning could provide a funding source to enable licensees to build out their systems and provide the latest in technological enhancements to the public.²⁵ We

²⁰ Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, *Second Order on Reconsideration and Seventh Report and Order*, 11 FCC Rcd 2639, 2711-12, ¶¶ 177-179 (1995) (*900 MHz Second Reconsideration Order*) (adopting rural telco partitioning). On September 20, 1996, American Mobile Telecommunications Association, Inc., filed a Petition for Rulemaking requests the Commission to expand its rules to permit partitioning to include all 900 MHz SMR licenses and to permit spectrum disaggregation. See American Mobile Telecommunications Association, Inc. Files Petition for Rulemaking to Expand Geographic Partitioning and Spectrum Disaggregation Provisions for 900 MHz SMR, *Public Notice*, DA 96-1654 (released October 4, 1996). That Petition for Rulemaking was incorporated into the 800 MHz rulemaking proceeding, PR Docket No. 94-144, where similar partitioning and disaggregation issues are being considered. *Id.*

²¹ Amendment of the Commission's Rules Regarding the 37.0 - 38.6 GHz and 38.6 - 40.0 GHz Bands, ET Docket No. 95-183, *Notice of Proposed Rulemaking and Order*, 11 FCC Rcd 4930, 4942-43, 4972-73, ¶¶ 24, 89-90 (1995) (*38 GHz NPRM*) (proposing partitioning for rural telcos, and seeking comment on whether partitioning and disaggregation should be available to all licensees in the 37 GHz band).

²² Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service, GN Docket No. 96-228, *Notice of Proposed Rule Making*, FCC 96-411, ¶¶ 27-29, released November 12, 1996 (proposing partitioning and disaggregation for the WCS service).

²³ *Notice* at ¶¶ 9-10.

²⁴ *Id.*

²⁵ *Id.*

tentatively concluded that our partitioning proposals would implement, in part, the requirement of Section 257 of the Communications Act that we eliminate barriers to entry in the telecommunications market.²⁶

7. Comments. The majority of commenters support the proposals in the *Notice* to broaden the partitioning rules to allow entities other than rural telcos to obtain partitioned licenses.²⁷ Commenters agree with the tentative conclusion in the *Notice* that flexible partitioning and disaggregation rules would create additional opportunities for small businesses, niche services, and rural wireless providers by reducing the amount of capital necessary to enter the business.²⁸ Omnipoint observes that partitioning and disaggregation will create flexibility for licensees, allowing new services to become competitive and first-generation PCS services to grow and flourish.²⁹ PCS Wisconsin contends that a more liberal partitioning policy will allow PCS spectrum to be used more efficiently and will speed service to underserved areas.³⁰ US West agrees that more liberalized partitioning and disaggregation rules will enable more entities to become PCS licensees because the market will create additional, smaller, licenses.³¹

8. The primary opponents of broadening eligibility for partitioning are the rural telcos. They advocate limiting partitioning to rural telcos or, alternatively, giving the rural telcos a "right of first refusal" to the partitioned area.³² The rural telcos argue that they are the best qualified to offer service to rural areas because they can build upon their existing facilities to rapidly deploy

²⁶ *Id.*

²⁷ See, e.g., AirGate Comments at 2; AT&T Wireless Comments at 1-2; BellSouth Comments at 4; Carolina Independents Comments at 3; Cook Inlet Comments at 6-9; Cellular Telecommunications Industry Association (CTIA) Comments at 4; GTE Comments at 1-2; Industrial Telecommunications Association (ITA) Comments at 3; Liberty Comments at 2; Motorola Comments at 1; NextWave Comments at 1; Sprint Comments at 1; Omnipoint Comments at 1-2; Personal Communications Industry Association (PCIA) Comments at 1; PCS Wisconsin Comments at 1; SR Telecom Comments at 4; US West Comments at 2; United States Telephone Association (USTA) Comments at 1; UTC Comments at 1; Western Wireless Comments at 1-2.

²⁸ See, e.g., CTIA Comments at 4; Omnipoint Comments at 2; US West Comments at 5-6.

²⁹ Omnipoint Comments at 4.

³⁰ PCS Wisconsin Comments at 1-2.

³¹ US West Comments at 6.

³² See, e.g., 3 Rivers Comments at 4; Century Comments at 9-10; Illuminet Comments at 7 (alternatively supports right of first refusal); National Telephone Cooperative Association (NTCA) Comments at 5-6 (supports right of first refusal); Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) Comments at 4; Ad Hoc Rural Telecommunications Group (RTG) Comments at 1-2 and RTG Reply Comments at 6-7 (alternatively supports right of first refusal); Rural Cellular Association (RCA) Comments at 4 (proposes that in rural areas the rural telcos have the right of first refusal to obtain partitioning or disaggregation); National Rural Telecommunications Cooperative (NRTC) *Ex Parte* at 2; USTA Comments at 5 (supports right of first refusal).

PCS.³³ The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) argues that there will be a loss of service for rural customers if the Commission allows open partitioning because other entities will not have the same incentives to serve rural areas.³⁴ Century states that A and B block PCS licensees have been reluctant to partition to rural telcos and that the Commission's proposal will eliminate any further incentive for rural telco partitioning.³⁵ Century and 3 Rivers contend that allowing PCS licensees to partition to parties other than rural telcos will result in speculation over licenses and drive up the cost of partitioning.³⁶ Century also argues that unlimited partitioning could exacerbate technical compatibility problems among carriers, thus undermining the PCS licensing system.³⁷

9. Illuminet proposes that once an initial license term has passed, any portion of a license area that is not being served would be available automatically to a rural telco for a period of one year.³⁸ During that one year period, the rural telco would have the exclusive right to file an application to propose service to the unserved area.³⁹

10. The rural telco commenters also contend that the Commission designed partitioning as the sole means of fulfilling the mandate of Section 309(j)(3) of the Communications Act to ensure that licenses are disseminated among a wide variety of applicants including rural telcos.⁴⁰ The rural telcos argue that they were effectively denied access to the C block auctions because the auction participants were backed by entities with "deep pockets."⁴¹ These commenters argue that rural telcos relied on the Commission's promise that they could participate in the PCS service through partitioning and more rural telcos would have participated in the C block auctions had they known that partitioning would be available to other parties.⁴² RTG argues that the Commission cannot change its partitioning rules in the middle of the PCS auctions because the rural telcos established their business plans based upon the fact that they would be the only parties permitted to obtain partitioned licenses and, as such, they did not participate in the A, B,

³³ See, e.g., OPASTCO Comments at 7; RTG Comments at 4; 3 Rivers Comments at 2; Wireless North Reply Comments at 2-3.

³⁴ OPASTCO Comments at 7.

³⁵ Century Comments at 8.

³⁶ 3 Rivers Comments at 4; Century Comments at 11.

³⁷ *Id.* at 10-11.

³⁸ Illuminet Comments at 9.

³⁹ *Id.*

⁴⁰ Illuminet Comments at 3-4; RTG Comments at 6-7.

⁴¹ See, e.g., NTCA Comments at 2-4; OPASTCO Comments at 4.

⁴² See, e.g., Century Comments at 7-8; Illuminet Comments at 4-5; NTCA Comments at 5.

and C block auctions.⁴³ RTG alleges that the rural telcos did not have sufficient notice to prepare for the broadband PCS auctions.⁴⁴

11. The rural telco commenters propose that, if partitioning is allowed for all PCS licensees, the Commission should give a right of first refusal to rural telcos whereby parties entering into a partitioning agreement would be required to notify the rural telco located within the partitioned area and offer the partitioned area to the rural telco on terms similar to those proposed in the agreement.⁴⁵ RCA contends that the right of first refusal will ensure deployment of rural service while simultaneously promoting competition.⁴⁶

12. Other commenters oppose the right of first refusal proposed by the rural telcos.⁴⁷ AT&T Wireless and US West argue that the right of first refusal would effectively grant rural telcos exclusive partitioning authority because no other party would be willing to bargain with a PCS licensee knowing that a rural telco could disrupt the transaction.⁴⁸ AT&T Wireless also contends that the right of first refusal would be difficult to implement since a single transaction may encompass more than one rural service area and would require the consent of more than one rural telco.⁴⁹ AT&T Wireless observes that this would cause delay and would require the parties to divide the partitioned area into smaller parts if a rural telco were to exercise its right of first refusal for only one portion of the partitioned area.⁵⁰ PCIA notes that a partitioning agreement may be part of a larger assignment transaction and it may not be possible to separate out the partitioning agreement in the event a rural telco exercises its right of first refusal.⁵¹ US West argues that granting rural telcos a right of first refusal would have the practical effect of allowing only one PCS licensee to partition its license because there are six PCS licensees assigned to each area, while there may be only one rural telco serving that area.⁵²

⁴³ RTG Reply Comments at 5-6.

⁴⁴ *Id.*

⁴⁵ RCA Comments at 4; NTCA Comments at 6; Illuminet Comments at 7-8; USTA Comments at 5; RTG Comments at 1-2.

⁴⁶ RCA Comments at 5-6.

⁴⁷ See, e.g., AT&T Wireless Reply Comments at 5; PCIA Reply Comments at 7; US West Reply Comments at 6.

⁴⁸ AT&T Wireless Reply Comments at 5; US West Reply Comments at 9-10.

⁴⁹ AT&T Wireless Reply Comments at 5.

⁵⁰ *Id.*

⁵¹ PCIA Reply Comments at 7-8.

⁵² US West Reply Comments at 5.

13. Discussion. We conclude that relaxing our PCS geographic partitioning rules, as discussed herein, will help to (1) remove potential barriers to entry thereby increasing competition in the PCS marketplace; (2) encourage parties to use PCS spectrum more efficiently; and (3) speed service to unserved and underserved areas. Parties that were unsuccessful bidders or that did not participate in the PCS auctions will be able to use partitioning as a method to acquire PCS licenses after the auctions. Smaller or newly-formed entities, for example, may enter the PCS market for the first time through partitioning. Under our prior rules, such entities would have been unable to qualify for partitioning because of our rural telco restriction. By eliminating that restriction, these entities will be able to negotiate for licenses for portions of the original service area at a cost that is proportionately less than that of the full geographic market.⁵³

14. We also find that increasing the number of parties that may obtain partitioned PCS licenses will lead to more efficient use of PCS spectrum and will speed service to underserved or rural areas. PCS licensees will be able to partition portions of their markets to entities more willing to serve niche markets instead of postponing service to those areas.⁵⁴ We believe that retaining the existing partitioning restrictions, as recommended by the rural telco commenters, would prevent additional small businesses and other entities from using partitioning to enter the broadband PCS market.⁵⁵ In addition, restricting the number of parties that are eligible for partitioned PCS licenses only serves to unreasonably reduce the number of potential entrants into the PCS marketplace without any corresponding public interest benefit.⁵⁶ We find that retaining the partitioning restrictions will constitute a significant barrier to entry for small businesses; therefore, we decline to adopt the proposal suggested by the rural telco commenters to limit partitioning to rural telcos.

15. The rural telco commenters claim that changing the current partitioning rules would be inconsistent with the mandate set forth in Section 309(j)(3)(B) of the Communications Act⁵⁷ to ensure that licenses are disseminated among a wide variety of applicants including rural telcos. They contend that partitioning was the sole means by which the Commission sought to fulfill the Section 309(j)(3)(B) mandate for rural telcos.⁵⁸ We disagree. Rural telcos are able to take advantage of the special provision for small businesses we designed in our auction rules to obtain licenses in the entrepreneur block auctions. Furthermore, Sections 309(j)(3)(A), (B), and (D) of the Communications Act⁵⁹ direct the Commission to further the rapid deployment of new

⁵³ See US West Comments at 6.

⁵⁴ *Id.*

⁵⁵ See CTIA Comments at 4; Omnipoint Comments at 2; US West Comments at 5-6.

⁵⁶ *Id.*

⁵⁷ 47 U.S.C. §309(j)(3)(B); see Illuminet Comments at 3-4; RTG Comments at 6-7.

⁵⁸ *Id.*

⁵⁹ 47 U.S.C. §309(j)(3)(A), (B) and (D).

technologies for the benefit of the public including those residing in rural areas, to promote economic opportunity and competition, and to ensure the efficient use of spectrum. While encouraging rural telco participation in PCS service offerings is an important element in meeting these goals, Congress did not dictate that this should be the sole method of ensuring the rapid deployment of service in rural areas. We conclude that allowing open partitioning will further the goals of Section 309(j)(3) by allowing PCS licensees to partition to multiple entities within their markets rather than limiting partitioning to a small number of rural telcos.

16. The rural telcos argue further that they will not be able to compete for partitioned PCS licenses unless the Commission retains its current restriction because PCS licensees will be unwilling to partition their licenses to rural telcos and will choose to partition to CMRS providers with greater financial resources.⁶⁰ The rural telco commenters also argue that they relied to their detriment upon the current partitioning restrictions when devising their business plans and that many of them chose not to participate in the broadband PCS auctions because they believed that they would be the only parties that could obtain partitioned PCS licenses.⁶¹ We are unpersuaded that our action herein will harm the rural telcos' business plans. Under the new rules adopted herein, rural telcos will be fully able to obtain partitioned PCS licenses, as they were previously. Moreover, in many instances, rural telcos are likely to be in a superior position to obtain partitioned licenses. As the rural telco commenters acknowledge, they are uniquely qualified to provide PCS service to rural areas, because they possess the existing infrastructure and local marketing knowledge in these regions.⁶² Whether or not the rural telcos may have relied on our existing partitioning rules when designing their business plans, we find that open partitioning will not adversely affect those plans because rural telcos will be able to use their technical expertise and market position to compete with other parties to obtain partitioned PCS licenses for rural areas.

17. We also decline to adopt the rural telcos' proposal to require a right of first refusal.⁶³ Section 254 of the Telecommunications Act of 1996⁶⁴ states that, in seeking to promote its goal of universal service, the Commission should ensure that consumers from all parts of the Nation, including rural areas, have access to telecommunications and information services that is comparable to service in other, more urban areas and at rates that are comparable to the rates available in urban areas. Granting the rural telcos a right of first refusal would limit the number of parties that could obtain partitioned PCS licenses which would be at odds with our goals of encouraging participation in the PCS marketplace by as many parties as possible and reducing

⁶⁰ See Century Comments at 8 & 11; 3 Rivers Comments at 4.

⁶¹ Century Comments at 7-8; Illuminet Comments at 4-5; NTCA Comments at 5.

⁶² OPASTCO Comments at 7; RTG Comments at 4; 3 Rivers Comments at 2.

⁶³ RCA Comments at 4; NTCA Comments at 6; Illuminet Comments at 7-8; USTA Comments at 5; RTG Comments at 1-2.

⁶⁴ Pub. L. No. 104-104, § 101, 110 Stat. 56 (1996).

barriers to entry for small businesses. We find that increasing the number of potential entities that can acquire partitioned PCS licenses will result in better service and increased competition which may result in lower prices for PCS service.

18. We also find that the right of first refusal would be difficult to administer and could discourage partitioning.⁶⁵ As several commenters observed, the area proposed in a partitioning agreement may not coincide exactly with the area for which a rural telco would have a right of first refusal or a single partitioning transaction may encompass more than one rural telcos' service area. In those cases, the consent of multiple rural telcos would be required before a partitioning transaction could be consummated.⁶⁶ No single rural telco could exercise its right of first refusal for the entire the partitioned area. A further problem would be whether the rural telcos' right of first refusal would continue after the auction winner partitioned the license area to another party. Additionally, a partitioning agreement may be part of a larger assignment transaction. If a rural telco were to exercise its right of first refusal to acquire the partitioned area, it may not be possible to separate out the partitioning agreement to stand on its own and the entire assignment transaction could not be consummated.⁶⁷ For these reasons, we do not believe that the right of first refusal is feasible.

2. Available License Area, Restrictions on Timing of Partitioning, and Matters Related to Entrepreneur Block Licensees

a. License Area

19. Proposal. In the *Notice*, we proposed that partitioning be required along county lines.⁶⁸ We tentatively found that such an approach would provide flexibility for licensees seeking to partition their licenses while minimizing the administrative burden on the Commission.⁶⁹ We also stated that we would consider waiver requests where a proposed partitioning would not fall along county lines.⁷⁰

⁶⁵ AT&T Wireless Reply Comments at 5.

⁶⁶ *Id.*

⁶⁷ PCIA Reply Comments at 7-8.

⁶⁸ *Notice* at ¶ 18.

⁶⁹ *Id.*

⁷⁰ *Id.*

20. Comments. Most commenters disagree with our proposal that partitioning be required along county lines.⁷¹ Several commenters contend that counties may be too large to be viable as units for partitioning.⁷² For example, BellSouth observes that limiting partitioning to county lines may create areas that are too large to conform to the needs of small businesses.⁷³ AirGate notes that one county may contain several Basic Trading Areas (BTAs), which would make partitioning along county lines impossible.⁷⁴ Omnipoint observes that PCS licensees in the western United States would be disadvantaged by a county line approach because many BTAs in those States include only one county and, therefore, no partitioning would be allowed.⁷⁵ BellSouth and Carolina Independents also note the additional problem that some counties have two or more rural telcos providing service, and requiring partitioning along county lines would prevent rural telcos from entering into the PCS market.⁷⁶

21. BellSouth suggests that the parties should be able to use any established geopolitical boundary such as county, city, town, village, township, reservation, bodies of water, mountain ranges, or Economic Areas (EAs).⁷⁷ Omnipoint argues that the Commission has recognized the

⁷¹ See, e.g., AirGate Comments at 3; BellSouth Comments at 5; Carolina Independents Comments at 4; GTE Comments at 4 (market forces should dictate the size of the area to be partitioned); ITA Comments at 5 (areas smaller than a county should be permitted); Omnipoint Comments at 9-10 (some western counties are larger than BTAs; different geographic units such as municipal borders or industrial zones should be allowed for partitioning); PCIA Comments at 3 (permit partitioning along any recognized geopolitical boundary, and allow expedited waivers if natural boundaries would better determine the parameters); PCS Wisconsin Comments at 2 (Commission should allow partitioning along other established geopolitical boundaries such as municipalities or local exchange carrier service territories); Sprint Comments at 4 (Commission should permit any geographic lines to be drawn so long as the parties file a map of the proposed partition); SR Telecom Comments at 8 (Commission should permit partitioning of any service area); USTA Comments at 7 (waivers should be granted to allow arranging a service area which more closely relates to the established patterns of service demand, available infrastructure or available spectrum); US West Comments at 16 (parties should be permitted to use any geopolitical boundary for partitioning); Western Wireless Comments at 5 (waivers should be granted to allow partitioning of any area as long as it promotes a legitimate business purpose and poses no adverse effects on the public); Yelm Comments at 2 (partitioning should be allowed along any geopolitical boundary).

⁷² AirGate Comments at 3; BellSouth Comments at 5; Carolina Independents Comments at 4; Omnipoint Comments at 5.

⁷³ BellSouth Comments at 5.

⁷⁴ AirGate Comments at 3.

⁷⁵ Omnipoint Comments at 5.

⁷⁶ BellSouth Comments at 5; Carolina Independents Comments at 4.

⁷⁷ BellSouth Comments at 7. The Bureau of Economic Analysis of the Department of Commerce has divided the U.S. into 172 economic areas (EAs) effective April 10, 1995 to facilitate regional economic analysis. Each EA consists of one or more economic nodes -- metropolitan areas or similar areas that serve as centers of economic activity -- and the surrounding counties that are economically related to the nodes. Final Redefinition of the BEA Economic Areas, Department of Commerce, Docket No. 950-3020-64-5064-01, 60 Fed. Reg. 13,114 (Mar. 10, 1995).

benefits of cable-based PCS services and that the Commission should permit PCS licensees to partition in a manner that reflects a cable system's service area.⁷⁸ Carolina Independents contend that parties should be permitted to adopt partitioning boundaries that are not based on county lines if they agree to make available service area maps, information on the population count for each partitioned area, and information showing how the population figures were calculated so that the Commission would be able to easily identify boundaries and population in order to enforce cross-ownership and other regulations.⁷⁹

22. With respect to our proposal to permit parties to request waivers of the county line partitioning requirement, ITA argues that waivers are time consuming and they may pose an unwarranted hurdle to commercial transactions.⁸⁰ PCIA agrees that requiring a waiver will delay achievement of rational PCS service arrangements and will increase the Commission's work load.⁸¹

23. Discussion. We are persuaded by the commenters' arguments that limiting geographic partitioning of PCS licenses to those areas defined by county lines may not be reflective of market realities and may otherwise inhibit partitioning. As the commenters note, parties seeking a partitioned license may not desire to serve an entire county but rather a smaller niche market. Counties in some parts of the country may be too large to permit PCS partitioning because they extend across more than one BTA. We find that, if partitioning is limited to county lines, numerous parties would be required to seek a waiver of the county-line requirement, which would unnecessarily burden the Commission and the parties without any corresponding public interest benefit.

24. Based upon the record before us, we believe that permitting partitioning along any service area defined by the partitioner and partitionee is the most logical approach, provided they submit sufficient information to the Commission to maintain our licensing records. This will be the rule for all parties, including rural telcos. Partitioning applicants will be required to submit, as separate attachments to the partial assignment application, a description of the partitioned service area and a calculation of the population of the partitioned service area and licensed market. The partitioned service area must be defined by coordinate points at every 3 seconds along the partitioned service area agreed to by both parties, unless either (1) an FCC-recognized service area is utilized (*i.e.*, Major Trading Area, Basic Trading Area, Metropolitan Service Area, Rural Service or Economic Area) or (2) county lines are followed. These geographical coordinates must be specified in degrees, minutes and seconds to the nearest second of latitude and longitude, and must be based upon the 1927 North American Datum (NAD27). Applicants may also supply geographical coordinates based on 1983 North American Datum (NAD83) in

⁷⁸ Omnipoint Comments at 9-10.

⁷⁹ Carolina Independents Comments at 5.

⁸⁰ ITA Comments at 5.

⁸¹ PCIA Comments at 3.

addition to those required based on NAD27. This coordinate data should be supplied as an attachment to the partial assignment application, and maps need not be supplied. In cases where an FCC recognized service area or county lines are being utilized, applicants need only list the specific area(s) (through use of FCC designations) or counties that make up the newly partitioned area.⁸² Allowing partitioning along any agreed-upon service area will provide an opportunity for PCS licensees to design flexible and efficient partitioning agreements. By providing such flexibility to licensees for determining partitioned areas, we will permit the market to decide the most suitable service areas.

b. Non-entrepreneur block licenses

25. Proposal. In the *Notice*, we tentatively concluded that all licensees in the A, B, D, and E blocks should be permitted at any time to partition their licenses to eligible parties.⁸³ In addition, we sought comments on whether we should impose an overall limit on the size of the geographic area that non-entrepreneur block licensees would be allowed to partition.⁸⁴

26. Comments. Sprint was the lone commenter on this issue, agreeing with the proposal in the *Notice* that non-entrepreneur PCS licenses should be freely transferable, in part or in entirety.⁸⁵

27. Discussion. We conclude that the public interest will be served by allowing non-entrepreneur block licensees to freely partition their licenses to any other qualifying entity following the issuance of the license. Since non-entrepreneur block licensees are permitted to assign their entire license after grant, we find they should be able to assign a portion of their license following the issuance of their license. As we stated in the *Notice*, this proposal will advance the public interest by affording non-entrepreneur licensees greater flexibility. In addition, we will not adopt a limitation on the maximum size of geographic area that PCS licensees may partition. PCS licensees will be permitted to partition their licensed market areas without limitation on the overall size of the partitioned areas consistent with our rules.

c. Entrepreneur block licenses

28. Proposal. The entrepreneur blocks are designed to promote economic opportunities for a wide variety of applicants including small businesses, rural telcos, and businesses owned

⁸² For example, if a licensee desires to partition its license only for the service area needed by a rural telephone company, it will simply provide coordinate data points at each 3 second data point extending from the center of the service area (*i.e.*, at the 3 degree, 6 degree, 9 degree, 12 degree, etc. azimuth points with respect to true north).

⁸³ *Notice* at ¶ 19.

⁸⁴ *Id.*

⁸⁵ Sprint Comments at 5.

by minorities and women, as required by Section 309(j)(4)(C)(ii) of the Communications Act.⁸⁶ To further this goal, we proposed that entrepreneur block licensees be permitted to partition at any time to other parties that would qualify for entrepreneur block licenses (*i.e.*, to an entity that either holds other entrepreneur block licenses and thus at the time of auction satisfied the entrepreneur eligibility criteria, or that satisfies the entrepreneur eligibility criteria at the time of partitioning). However, we proposed certain restrictions be applied when an entrepreneur block licensee sought to partition to a non-entrepreneur.⁸⁷ We proposed that entrepreneurs not be permitted to partition to non-entrepreneurs for the first five years of the license term and that, after the first five years, unjust enrichment requirements⁸⁸ be applied if an entrepreneur partitions to a non-entrepreneur.⁸⁹ Furthermore, we proposed imposing unjust enrichment payments when an entrepreneur, qualifying as a small business under Section 24.720(b)(1), is awarded bidding credits or elects to pay by installment, and partitions to another entrepreneur that would not have qualified for those rights.⁹⁰ We sought comment on the method for determining how unjust enrichment payments should be calculated, the method for handling installment payment plans, and how to apportion the payment obligations for a partitioned market.⁹¹ We also sought comment on whether each party should be required to guarantee all or a portion of the partitioner's original auctions-related obligation in the event of default.⁹²

29. Comments. Commenters generally support the proposal in the *Notice* to permit partitioning of entrepreneur block licenses only to other entrepreneurs for the first five years of the license term.⁹³ Century and NTCA disagree with the proposal and they contend that

⁸⁶ *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5587-88, ¶ 127.

⁸⁷ *Notice* at ¶¶ 21 & 24.

⁸⁸ Unjust enrichment requirements are those mechanisms designed to prevent an entrepreneur block licensee from benefitting from special bidding provisions and becoming unjustly enriched by immediately selling its license to a party that does not qualify for such benefits. These requirements are set forth at Section 1.2111 and 24.716(d) of the Commission's Rules, 47 C.F.R. §§ 1.2111 & 24.716(d).

⁸⁹ *Notice* at ¶¶ 24-25.

⁹⁰ *Notice* at ¶ 23. The Commission permits those entities that qualify as small businesses to pay the full amount of their auction bids in installment payments over the term of their licenses. See 47 C.F.R. §§ 1.2210(e) & 24.716(b). The Commission also awards bidding credits (*i.e.*, payment discounts) to entities that qualify as small businesses. See 47 C.F.R. §§ 1.2210(a) & (f) and 24.717.

⁹¹ *Notice* at ¶ 23.

⁹² *Id.*

⁹³ See, *e.g.*, AirGate Comments at 2; Liberty Comments at 2; CTIA Comments at 8-9; USTA Comments at 7; Cook Inlet Comments at 6-9; NextWave Comments at 4; Omnipoint Reply Comments at 8. In its Reply Comments, the Rural Telephone Finance Cooperative (RTFC) questions the Commission's current rule, which limits complete license transfers in the C and F block to only those entities qualifying as entrepreneurs. RTFC Reply Comments at 2. We will not consider this issue since we find that it is outside of the scope of this proceeding.

entrepreneur block licensees should not be permitted to partition portions of their license areas to small businesses because they contend that some entities with extensive financial resources will attempt to bid up the prices of partitioned licenses and drive rural telephone companies from the partitioning markets.⁹⁴ NTCA argues that the Commission's proposal to allow designated entities to partition entrepreneur block licenses will result in further deterioration of any bargaining power rural telcos may have had to obtain partitioned PCS licenses and reduce those licensees' incentives to partition sparsely populated rural areas.⁹⁵ On the other hand, Sprint argues that a complete ban on partitioning to non-entrepreneurs in the first five years of the license is unnecessary.⁹⁶ Sprint suggests that entrepreneurs be permitted to partition up to 20 percent of their total license area and disaggregate up to 15 percent of total spectrum to non-entrepreneurs prior to the end of the first five years of the license term.⁹⁷ Opportunities Now Enterprises, Inc. (ONE) supports the proposal to allow partitioning between entrepreneurs but argues that the threshold for determining whether a party is a small business for the purposes of entrepreneur block partitioning should be \$11 million or less in annual sales.⁹⁸

30. Commenters also support the imposition of unjust enrichment payments for partitioning to a non-entrepreneur after the fifth year of licensing.⁹⁹ The commenters propose that unjust enrichment should be calculated based upon the population within the partitioned area in proportion to the total population of the market license area.¹⁰⁰ PCS Wisconsin contends that the price paid by the partitionee should not be considered in making this determination, but rather the determination should be made solely upon the price of the initial license based upon the corresponding proportion of the population within the partitioned area.¹⁰¹ Of the commenters opposing unjust enrichment payments, PCS Wisconsin and AirGate contend that a partitioning license holder should not be required to pay, on an accelerated basis, a portion of the outstanding principal balance which it owes under an installment payment plan because this would put a financial strain on small businesses and would constitute a barrier to entry.¹⁰² NextWave argues that unjust enrichment penalties would impose an unreasonable competitive disadvantage on

⁹⁴ Century Comments at 10; NTCA Comments at 4 (the Commission's rules enabled deep pockets to dominate the C block auctions).

⁹⁵ NTCA Comments at 4.

⁹⁶ Sprint Comments at 7.

⁹⁷ *Id.*

⁹⁸ ONE Comments at 2.

⁹⁹ AirGate Comments at 2 & n.2; Omnipoint Comments at 7-8; USTA Comments at 7.

¹⁰⁰ Cook Inlet Comments at 2; Omnipoint Comments at 8; PCS Wisconsin Comments at 3.

¹⁰¹ PCS Wisconsin Comments at 3.

¹⁰² PCS Wisconsin Comments at 2-4; AirGate Comments at 5.

entrepreneurial licensees and would distort the market by artificially affecting the relative values of entrepreneurial and non-entrepreneurial spectrum.¹⁰³ AirGate contends the partitioned licensees should not be required to guarantee the payments of the partitioner for the original license acquired at auction.¹⁰⁴

31. Discussion. We will permit entrepreneur block PCS licensees to partition at any time to other parties that would be eligible for licenses in those blocks. This is consistent with our rules allowing full transfer or assignment of an entrepreneur block licensee to another eligible entrepreneur at any time.¹⁰⁵ It will also further the Congressional mandate that small businesses have an opportunity to participate in the PCS marketplace.¹⁰⁶ Partitioning of entrepreneur block license areas to non-entrepreneurs will not be permitted for the first five years of a entrepreneur block license term. This restriction is necessary in order to ensure that entrepreneurs do not circumvent our restrictions on full license transfers by attempting to immediately partition a portion of their licenses to non-entrepreneurs.¹⁰⁷ For similar reasons, we will not adopt Sprint's proposal to allow entrepreneur block licensees to partition 20 percent of their market during the initial five years of their license term.¹⁰⁸

32. We find that our unjust enrichment requirements, as set forth in the *Competitive Bidding Second Report and Order*¹⁰⁹ and *Competitive Bidding Fifth Report and Order*,¹¹⁰ should be applied if an entrepreneur block licensee partitions a portion of its license area to a non-entrepreneur, after the initial five-year license term. We also will apply our unjust enrichment rules to transactions where entrepreneurs obtain partitioned licenses from other entrepreneurs and subsequently seek to assign their partitioned license to a non-entrepreneur.¹¹¹ We will also apply the unjust enrichment provisions to an entrepreneur block licensee that qualifies as a small

¹⁰³ NextWave Comments at 3.

¹⁰⁴ AirGate Comments at 5.

¹⁰⁵ See 47 C.F.R. § 24.839.

¹⁰⁶ Section 24.709(a) of the rules, 47 C.F.R. § 24.709(a), sets forth the criteria that parties must meet in order to be eligible for entrepreneur block (Blocks C and F) PCS licenses. The rule requires that an applicant, together with its affiliates and persons or entities that hold interests in the applicant and their affiliates, have gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million at the time the applicant's short form application (Form 175) is filed.

¹⁰⁷ See Airgate Comments at 2-3.

¹⁰⁸ Sprint Comments at 7-8.

¹⁰⁹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2394-95, ¶ 258-265.

¹¹⁰ *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5591, 5594, ¶ 141.

¹¹¹ Such transactions are prohibited until five years after the original license grant. See 47 C.F.R. § 24.839(d).

business who partitions to an entity that satisfies the entrepreneur block eligibility criteria but is not a small business that would be eligible for bidding credits or installment payments. The unjust enrichment provisions for full license transfers were adopted as a means of ensuring that large companies do not become the unintended beneficiaries of special provisions meant for smaller firms, such as bidding credits and installment payments.¹¹² Otherwise, an entrepreneur block licensee, having received such a special benefit, could exploit the system by seeking a full license transfer to a non-entrepreneur. We find that the same rationale would apply for entrepreneur block partitioning because the entrepreneur block licensee would be transferring a portion of its market to a party that does not qualify for such benefits. We believe that such unjust enrichment requirements strike the proper balance between promoting economic opportunities for entrepreneurs while preventing abuse of our entrepreneur block benefits.

33. We will use population as the objective measure to calculate the relative value of the partitioned area for determining all of our unjust enrichment obligations.¹¹³ Population will be calculated based upon the latest census data.¹¹⁴

34. Unjust Enrichment - Bidding Credits. If an entrepreneur licensee that received a bidding credit partitions a portion of its license to an entity that would not meet the eligibility standards for a bidding credit, we will require that the licensee reimburse the government for the amount of the bidding credit calculated on a proportional basis based upon the ratio of population of the partitioned area to the overall population of the licensed area.¹¹⁵ If an entrepreneur licensee that received a bidding credit partitions to an entity that would qualify for a lower bidding credit, we will require that the licensee reimburse the government for the difference between the amount of the bidding credit obtained by the licensee and the bidding credit for which the partitionee is eligible calculated on a proportional basis based upon the ratio of population of the partitioned area.¹¹⁶

¹¹² *Competitive Bidding Fifth Report and Order*, 9 FCC Rcd at 5591, 5594, ¶ 141.

¹¹³ See Cook Inlet Comments at 2; Omnipoint Comments at 8; PCS Wisconsin Comments at 3.

¹¹⁴ Parties may use the latest census data when it is made available.

¹¹⁵ See 47 C.F.R. §§ 1.2110(f) and 24.717(c)(1). For example, if an F block licensee bid \$1,000,000 at auction and received a 25 percent bidding credit (\$250,000), it would have been permitted to pay \$750,000 in principal to the U.S. Treasury. If that licensee seeks to partition a portion of its license area which represents 25 percent of the population of its entire license area (calculated at the time of partitioning) to an entity that would not qualify for a bidding credit, then 25 percent of the amount of the bidding credit (\$250,000 X .25 or \$62,500) must be paid by the licensee to the U.S. Treasury.

¹¹⁶ See 47 C.F.R. §§ 1.2110(f) and 24.717(c)(2). For example, if an F block licensee bid \$1,000,000 at auction and received a 25 percent bidding credit (\$250,000), it would have been permitted to pay \$750,000 in principal to the U.S. Treasury. If that licensee seeks to partition a portion of its license area which represents 25 percent of the population of its entire license area (calculated at the time of partitioning) to an entity that would have qualified for only 10 percent bidding credit (\$100,000), then 25 percent of the difference between the bidding credits (\$250,000 - \$100,000 X .25 or \$37,500) must be paid by the licensee to the U.S. Treasury.

35. Unjust Enrichment - Installment Payments. As in the case of bidding credits, a partitionee's repayment obligations will vary depending on its entrepreneurial status. If an entrepreneur licensee making installment payments partitions a portion of its licensed area at any time to an entrepreneur that does not meet the applicable installment payment eligibility standards,¹¹⁷ we will require payment of principal and interest based upon a ratio of the population of the partitioned area to the overall population of the licensed area. If an entrepreneur licensee making installment payments partitions to an entity that would qualify for less favorable installment payment terms, we will require the licensee to reimburse the government for the difference between the installment payment paid by the licensee and the installment payments for which the partitionee is eligible, based upon the ratio of population of the partitioned area to the overall population of the licensed area.¹¹⁸

36. Installment Payment Issues. In partitioning cases involving installment payments, we must decide how to divide the installment payment obligations between the original licensee and the partitionee, as well as determine the procedures for default in making the payments. We find that separating the payment obligations and default provisions of the original licensee and partitionee is the best approach because it reduces each party's risk and creates payment obligations that can be enforced separately against the defaulting party without adversely affecting the other licensee.¹¹⁹ We adopt the following rules to address the various combinations of parties and the relative obligations for each in the event an entrepreneur seeks to partition its license:

(a) No Continued Installment Payments. When an entrepreneur block licensee with installment payments partitions its license after the five-year holding period to a party that would not qualify for installment payments under our rules or to an entity that does not desire to pay for its share of the license with installment payments, we will first apportion the percentage of the remaining government obligation (including accrued and unpaid interest calculated on the date the partial assignment application is filed) between the partitionee and original licensee based upon the ratio of the population of the partitioned area to the population of the entire original licensed area. Under this procedure, both parties will be responsible to the U.S. Treasury for their proportionate share of the balance due including accrued and unpaid interest calculated on the date the partial assignment application is filed. We will require, as a condition of grant of the partial assignment application, that the partitionee pay its entire *pro rata* amount within 30 days of Public Notice conditionally granting the partial assignment application.¹²⁰ Failure to meet this condition will result in the automatic cancellation of the grant of the partial assignment application. The partitioner will receive new financing documents (promissory note and security agreement) with a revised payment obligation, based on the remaining amount of time on the

¹¹⁷ See 47 C.F.R. §§ 1.2110(e) and 24.716(b).

¹¹⁸ See 47 C.F.R. § 24.716(d)(3).

¹¹⁹ See Cook Inlet Comments at 2.

¹²⁰ Paragraph 71 of this Report and Order sets forth the application procedures we have adopted for partitioning and disaggregation. See *infra* ¶ 71.

original installment payment schedule. These financing documents will replace the partitioner's existing financing documents which will be marked "superseded" and returned to the licensee upon receipt of the new financing documents. The original interest rate, established at the time of the issuance of the initial license in the market, will continue to be applied to the partitioner's portion of the remaining government obligation.¹²¹ We will require, as a further condition to approval of the partial assignment application, that the partitioner execute and return to the U.S. Treasury the new financing documents within 30 days of the Public Notice conditionally granting the partial assignment application. Failure to meet this condition will result in the automatic cancellation of the grant of the partial assignment application. A default on an obligation will only affect that portion of the market area held by the defaulting party. The payments to the U.S. Treasury are required notwithstanding any additional terms and conditions agreed to between or among the parties.¹²²

(b) Partitioning With Continued Installment Payments. Where both parties to the partitioning arrangement qualify for installment payments under Section 24.720(b)(1), we will permit the partitionee to make installment payments on its portion of the remaining government obligation.¹²³ Partitionees are free, however, to make a lump sum payment of their *pro rata* portion of the remaining government obligation within 30 days of the Public Notice conditionally granting the partial assignment application. Should a partitionee choose to make installment payments, we will require, as a condition to approval of the partial assignment application, that both parties execute financing documents (promissory note and security agreement) agreeing to pay the U.S. Treasury their *pro rata* portion of the balance due (including accrued and unpaid interest on the date the partial assignment application is filed) based upon the installment payment terms for which they would qualify. These documents must be executed and returned to the U.S. Treasury within 30 days of the Public Notice conditionally granting the partial assignment application. Either party's failure to meet this condition will result in the automatic cancellation of the grant of the partial assignment application. The original interest rate, established at the time of the issuance of the initial license in the market, will apply to both parties' portion of the

¹²¹ See 47 C.F.R. § 1.2210(e)(3)(i).

¹²² For example, if an entrepreneur block licensee owes \$1,000,000 in interest and principal for a market area and, after four years of payments, has paid \$400,000 of the obligation and is partitioning a portion of its license area which represented 25 percent of the population of the entire license area (calculated at the time of partitioning) to an entity that would not qualify for installment payments, then 25 percent of the remaining \$600,000 government obligation (\$150,000) must be paid by the partitionee to the U.S. Treasury. The partitioner's installment payments to the U.S. Treasury would be reduced by that amount and it would receive a new promissory note reflecting the reduced amount due. The original interest rate, calculated at the time the initial license was issued to the licensee, would continue to be applied to the licensee's remaining installment payments.

¹²³ In addition, partitionees that are eligible for installment payments may elect to pay some of their outstanding balance in a lump sum payment to the U.S. Treasury and to pay the remainder of the balance pursuant to an installment payment plan.

remaining government obligation.¹²⁴ Each party will receive a license for its portion of the market area and each party's financing documents will provide that a default on its obligation would only affect their portion of the market area. These payments to the U.S. Treasury are required notwithstanding any additional terms and conditions agreed to between or among the parties.¹²⁵

3. Construction Requirements

37. Proposal. Under our existing rules, PCS licensees are required to meet minimum construction requirements. PCS licensees in A, B, and C blocks must provide coverage to one-third of the population of the license area within five years and two-thirds of the population of the license area within ten years.¹²⁶ PCS licensees in the D, E, and F blocks are required to provide coverage to one-fourth of the population of the license area within five years, or, alternatively, they may submit a showing demonstrating that they are providing substantial service as defined in our rules.¹²⁷

38. In the *Notice*, we proposed that both the partitioners and partitionees have two construction options to choose from when they submit their partitioning application.¹²⁸ Under the first option, the partitioner and partitionee would be subject to the same construction requirements for their respective areas regardless of when the partitionee acquired its license.¹²⁹ Thus, the partitionee of a 30 MHz broadband PCS license would be required to provide service to one-third of the population of its partitioned license area within five years of the license term and two-thirds of the population by the end of the ten-year license term. A partitionee of a 10 MHz

¹²⁴ See 47 C.F.R. § 1.2210(e)(3)(i).

¹²⁵ For example, if an entrepreneur block licensee owes \$1,000,000 in interest (at 7% calculated at the time of licensing) and principal and, after four years of payments, has paid \$400,000 of the obligation and is partitioning a portion of its license area which represented 25 percent of the population of the entire license area (calculated at the time of partitioning) to an entity that would qualify for installment payments, then we would apportion the remaining \$600,000 balance owed the U.S. Treasury between the licensee and partitionee. The licensee would be required to continue making installment payments on its 75 percent of the balance owed (\$450,000) and the partitionee would be required to make installment payments on its 25 percent of the balance owed (\$150,000). Each party would receive financing documents for its share of the remaining balance with an interest rate equal to the interest rate calculated at the time of the issuance of the initial license in the market.

¹²⁶ 47 C.F.R. § 24.203(a); *Broadband PCS Memorandum Opinion and Order*, 9 FCC Rcd at 5018-19, ¶ 155. Licensees may use the 2000 census to determine the 10-year construction requirement, rather than the 1990 census. *Id.* at 5019 n.251.

¹²⁷ 47 C.F.R. § 24.203(a). "Substantial" service is defined as service that is sound, favorable, and substantially above a level of mediocre service that might just minimally warrant renewal. See 47 C.F.R. § 24.16(a).

¹²⁸ *Notice* at ¶¶ 32-34.

¹²⁹ *Id.* at ¶ 33.